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No. 06-715

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IN THE

Supreme Court of the United States

MAN-SEOK CHOE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION

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INTRODUCTION

The extradition judge found "no doubt" that petitioner's appearance in court could be ensured through the imposition of conditions if petitioner were released on bail. Pet. App. 7a, 40a. Respondent ignores this finding that petitioner posed absolutely no risk of flight, and asserts "that almost every extradition defendant (including petitioner) is, by definition, a fugitive from justice and thus a flight risk." Opp. Br. 9. Respondent resorts to this unsupported generalization because to acknowledge otherwise would be to admit that, when no flight risk is present, there is no justification for the serious deprivation of liberty caused by detention without bail.

Rather than squarely addressing that difficult issue, respondent sidesteps it, while overstating this Court's holding in *Wright v. Henkel*, 190 U.S. 40 (1903), asserting a meritless claim of mootness, incorrectly suggesting that bail cannot ever be granted to a defendant who is challenging an order certifying his extradition, and broadly citing several cases in which this Court has held detention schemes constitutional without acknowledging that the only detention that has been held consistent with due process is detention carefully tailored to serve weighty state interests. This Court should grant certiorari to correct the lower courts' misunderstanding of *Wright v. Henkel* and to address the important due process issue raised by this case.

ARGUMENT

1. *The questions presented are not moot.*

Respondent asserts that the extradition judge's October 10, 2006 order certifying the Republic of Korea's request for petitioner's extradition moots the question whether the Due Process Clause forbids the detention without bail of an extradition defendant who poses no flight risk or danger to society. Opp. Br. 4-5. However, petitioner has not yet been extradited to Korea; he remains in federal custody; and his habeas

petition challenging the ruling certifying his extradition remains pending.

On these facts, the question whether petitioner's detention without bail violates due process is not moot. At present, petitioner is precluded from seeking release on bail while his habeas petition is pending, because the Ninth Circuit has already rejected his request for release and his argument that due process requires his release. App. 44a (citing *Wright v. Henkel*, 190 U.S. 40 (1903); *Salerno v. United States*, 878 F.2d 317 (9th Cir. 1989)). The Ninth Circuit's rulings are the law of the case, and preclude reexamination of those questions in proceedings addressing petitioner's current right to bail. *See Snow-Erlin v. United States*, 470 F.3d 804, 807 (9th Cir. 2006) (appellate decision on legal issue must be followed in subsequent proceedings in same case).[1]

Where, as here, a legal ruling has continued legal force and effect, a challenge to that ruling is not moot. For example, in *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175 (1968), the Court reached the merits of a challenge to a long-expired, ten-day temporary injunction restraining a white supremacist organization from holding certain rallies. The Court reasoned that the state court decision that had affirmed the temporary injunction "continue[d] to play a substantial role in the response of officials to [the group's] activities." *Id.* at 178. Therefore, "[t]he underlying question persists and is agitated by the continuing activities and program of petitioners: whether, by what processes, and to what extent the authorities of the local governments may restrict petitioners in their rallies and public meetings." *Id.* at 179. In concluding that the merits of the case were properly before it, the Court relied on a previous decision concerning the mootness of a challenge to a state law authorizing seizure of

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[1] Law-of-the-case doctrine applies not only to explicit rulings but also to those that by necessary implication must have been made. *See id.*

certain businesses involved in labor disputes, when the challenged seizure had terminated. *See id.* (discussing *Division 1287 of Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of America v. State of Missouri*, 374 U.S. 74 (1963) (hereinafter "*Division 1287*")). In that labor case, the Court had rejected the argument that the challenge was moot, reasoning that although the seizure and the strike that prompted it had terminated, "the labor dispute remains unresolved. There thus exists in the present case not merely the speculative possibility of invocation of [the seizure law] in some future labor dispute, but the presence of an existing unresolved dispute which continues subject to all the provisions of the [law]." *Division 1287*, 374 U.S. at 78.

In the instant case, but for the Ninth Circuit rulings that are the subject of the certiorari petition, petitioner could apply to the Ninth Circuit for release on bail under Federal Rule of Appellate Procedure 23(b), which authorizes the release of prisoners while a district court decision denying their habeas petition is under review. Because the challenged rulings preclude petitioner from making such application (and thus have continuing consequences for him), the questions presented are not moot. *Compare Shango v. Jurich*, 681 F.2d 1091, 1096 n.10 (7th Cir. 1982) (parties agreed appeal of preliminary injunction no longer in effect was not moot, because, among other things, holdings were law of the case).[2]

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[2] Respondent points out that the extradition statute, while silent on the issue of bail before extradition is certified, directs the extradition judge to issue a warrant for the commitment of a person whose extradition has been certified. Opp. Br. 5 (citing 18 U.S.C. § 3184). But neither the statute nor the case authority cited by respondent (*Lopez-Smith v. Hood*, 121 F.3d 1322, 1326 (9th Cir. 1997)) addresses whether bail may be granted after that warrant issues. Several courts have permitted bail, or have assumed that bail is permissible, after certification of extradition. *See, e.g., Beaulieu v. Hartigan*, 554 F.2d 1, 1-2 (1st Cir. 1977) (*per curiam*) (affirming district court's denial of habeas petition challenging certification of extradition, but leaving bail decision to district court); *see also*

Respondent also asserts that the extradition judge's certification of extradition "alters the legal analysis." Opp. Br. 5. But that does not mean the earlier decisions regarding detention before the extradition hearing are moot; it simply means that, even if this Court reverses the pre-certification order denying bail to petitioner, that ruling will not necessarily establish the invalidity of petitioner's post-certification detention.[3]

Furthermore, the Ninth Circuit's ruling that petitioner must be detained without bail pending his extradition hearing, despite the finding that he poses no flight risk, may continue to preclude petitioner's release even if his habeas petition challenging his extradition is granted. That pending habeas petition raises substantial grounds for vacating the magistrate's certification: among others, that the applicable Korean statutes of limitations periods have expired, that two of the charges do not meet the requisite dual criminality test for extraditable offenses because they do not constitute crimes in the United States, and that the third charge is not supported by probable cause. *See* Opening Brief of Appellant, *Choe v. Torres*, No. 06-56634, at 17-49 (filed in 9th Cir. Mar. 23, 2007). If the Ninth Circuit grants petitioner's habeas petition

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United States v. Taitz, 130 F.R.D. 442, 445-46 (S.D. Cal. 1990) (justifying release on bail based in part on projected length of habeas proceedings if extradition certified); *In re Kirby*, 106 F.3d 855, 863 (9th Cir. 1996) (same). Moreover, Federal Rule of Appellate Procedure 23(b) specifically authorizes release of a prisoner while a lower court decision denying his or her habeas petition is under appellate review. And even if the applicable statute were framed in mandatory terms, a ruling by this Court that the Due Process Clause requires the release of extradition defendants who pose no flight risk or danger would prevail over a statutory mandate.

[3] Petitioner would argue that the due process analysis requires the same result in either circumstance, and that even after certification of extradition, the absence of flight risk or danger means that the government lacks adequate justification to deprive him of his physical liberty while he challenges that certification through habeas proceedings.

and vacates the order certifying extradition, yet permits a new extradition hearing, petitioner would be back in the position of a defendant awaiting an extradition hearing. This Court has held a similar possibility that circumstances could change in a manner that would give renewed effect to a challenged ruling precludes a finding of mootness. *See City of Erie v. Paps A.M.*, 529 U.S. 277, 287 (2000) (closure of nude dancing establishment did not moot owner's challenge to city ordinance, because business was "still incorporated" and "could again decide to operate a nude dancing establishment" in city); *see also id.* at 302 (Scalia, J., concurring in judgment) (pointing out that business's sole shareholder had filed sworn affidavit disclaiming any intent to own or operate nude dancing establishment in future).

2. *Alternatively, an exception applies that would preclude dismissal of this case on mootness grounds.*

Even if respondent were right that this case is moot, that would not preclude review by this Court because the controversy would be capable of repetition yet evade review. Petitioner may very well be detained again pending extradition proceedings: if his habeas petition is successful and extradition is ultimately denied (either because the Ninth Circuit ruling does not permit retrial or because the extradition judge denies certification upon retrial), but Korea initiates another attempt to seek extradition on the same charges;[4] if the Secretary of State exercises her discretion

[4] Double jeopardy protections do not attach to extradition hearings; nor do findings in an extradition proceeding have subsequent preclusive effect if the foreign government makes another extradition request, even if the request relies on the same evidence and even if extradition was earlier denied based on insufficiency of the evidence. *See Collins v. Loisel*, 262 U.S. 426, 429-30 (1923). It is not uncommon for foreign governments to renew extradition requests after initial extradition attempts prove unsuccessful. *See, e.g., United States v. Sai-Wah*, 270 F.Supp.2d 748, 749 (W.D.N.C. 2003); *In re Atta*, 706 F. Supp. 1032, 1035-36 (E.D.N.Y. 1989).

not to extradite petitioner but Korea subsequently initiates another extradition attempt on the same or related charges; or if petitioner is acquitted of the charges he faces in Korea or is convicted and serves out his term, returns to the United States (his country of residence), and Korea again seeks to extradite him on these charges or others.

This Court has deemed cases involving similar prospects of repetition to fit within the "capable of repetition yet evading review" exception to mootness doctrine. In *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), for example, this Court reviewed an order restricting the media from certain communications during a criminal defendant's trial, even though the defendant had been convicted and sentenced to death by the time the case reached the Court. The Court reasoned that, "[i]f [the defendant]'s conviction is reversed by the Nebraska Supreme Court and a new trial ordered, the District Court may enter another restrictive order to prevent a resurgence of prejudicial publicity before [his] retrial," and that "these orders are by nature short-lived." *Id.* at 546-47.[5] The Court has also declined to dismiss on mootness grounds other cases involving orders that were by nature temporary, when such a dismissal would likely preclude review of the merits issue. *See, e.g.*, *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 126-27 (1974) ("There are exceptions, of course. But the great majority of economic strikes do not last long enough for complete judicial review of the controversies they engender. . . . A strike['s] . . . termination . . . should not preclude challenge to state policies that have had their impact and that continue in force, unabated and unreviewed. The judiciary must not close the door to the resolution of the important questions these concrete disputes present.") (internal citations omitted); *Roe v. Wade*, 410 U.S. 113, 125 (1973) (temporary

[5] The Court also noted that the order at issue authorized prosecutors who worked for the State, a party to the case, to seek similar orders in other cases. *Id.* But the mootness holding was not dependent on this fact.

nature of pregnancy would effectively deny appellate review if end of pregnancy rendered case moot: "Our law should not be that rigid."); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911) ("The question involved in the orders of the Interstate Commerce Commission are usually continuing . . . , and these considerations ought not to be, as they might be, defeated, by short-terms orders, capable of repetition, yet evading review, and at one time the government, and at another time the carriers, have their rights determined by the Commission without a chance of redress.").

In the instant case, the Ninth Circuit denied bail on June 13, 2006 and denied reconsideration on August 7, 2006. The extradition judge issued an order certifying the extradition request on October 10, 2006. The two months between the Ninth Circuit's final bail ruling and certification of extradition would not have provided sufficient time for petitioner to seek certiorari, much less to obtain this Court's merits review. Nor will other extradition cases offer greater opportunities for certiorari review. As the Petition pointed out, very few extradition defendants pursue their cases through the certiorari process because most submit voluntarily to extradition rather than remain in custody for months or years. *See* Pet. 17-18.[6]

3. *Respondent misstates the holding of Wright v. Henkel.*

On the merits, respondent contends that *Wright v. Henkel*, 190 U.S. 40 (1903), compels extradition defendants to demonstrate special circumstances in order to obtain bail. Opp. Br. 6-7 & n.2. In fact, respondent goes even further and characterizes *Wright* as requiring "an *exceptional* showing" in order "to obtain bail." *Id.* at 7 (emphasis added).

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[6] Extradition defendants who are ultimately convicted and sentenced in a foreign country often do not receive credit toward their foreign sentence for the time they spent incarcerated in the United States. *See, e.g., In re Smyth*, 863 F. Supp. 1137, 1148 (N.D. Cal. 1994), *reversed on other grounds*, 61 F.3d 711 (9th Cir. 1995).

Wright holds nothing of the sort. Nowhere in the opinion did the Court state that "special" or "exceptional" circumstances must be shown before an extradition defendant may be released. Rather, in *Wright*, the Court rejected the lower court's ruling that bail was never available in such cases, "whatever the special circumstances." *Wright*, 190 U.S. at 63. It then noted that, in any event, the record in the case did not support bail, without explaining why.[7] Contrary to respondent's suggestion, the Court did not hold that Mr. Wright was required to show special circumstances but had not done so.[8] The Court also did not address the question whether the absence of flight risk could itself constitute a circumstance ("special" or otherwise) sufficient to support a grant of bail.

The Court's observation in *Wright* that bail should not ordinarily be granted in extradition cases also did not establish (and constitutionally could not have established) that special circumstances other than the absence of danger/risk of flight are required before an extradition defendant may be released on bail. In fact, the Court's observation is consistent with the notion that the government's interest in preventing flight and the likelihood of flight are both heightened in extradition cases. But the strength of this interest and fact that it is more likely to be threatened in extradition cases does not justify detention of an extradition defendant who has been found to pose *no* risk of flight without bail.[9]

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[7] Thus, for example, the Court did not explain if it meant that the factual showing of Mr. Wright's health problems was insufficient, that health problems could never justify a grant of bail, or something in between.

[8] Even if the Court had held such circumstances to be required, petitioner would ask this Court to reconsider that holding. *See* Pet. 9-10 n.5.

[9] As respondent points out, Mr. Wright did argue that his detention without bail violated due process. *Wright*, 190 U.S. at 43. The Court in 1903 did not address that argument, which is briefly asserted without any further explanation in one of Mr. Wright's briefs to the Court. (The briefs in that case focused almost exclusively on whether courts have the inher-

4. *Respondent entirely fails to answer petitioner's due process argument.*

As previously mentioned, respondent baldly asserts "that almost every extradition defendant (including petitioner) is, by definition, a fugitive from justice and thus a flight risk." Opp. Br. 9. That assertion ignores the extradition judge's findings to the contrary in this case and the fact that many extradition defendants are present in this country not because they fled prosecution in another but because, like petitioner, they live here. *See* Pet. 3.

Respondent's failure to address these findings is no surprise, for if respondent were to admit that petitioner poses no risk of flight, it would be forced to defend detention without bail that serves no articulable purpose, much less any important purpose. Respondent cites a number of cases in which this Court has upheld detention schemes against due process challenges; petitioner cited most of the same cases and explained that those schemes involved substantial procedural safeguards and required strong showings of danger to society or risk of flight. Pet. 12-13. But respondent ignores the language in those cases making clear that the incidents and nature of the detention imposed must relate to the interest purportedly served. *See id.* at 13-15 (citing *Jones v. United States*, 463 U.S. 354, 368 (1983); *Schall v. Martin*, 467 U.S. 253, 270 (1984); *United States v. Salerno*, 481 U.S. 739, 747 (1987); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *Zadvydas v. Davis*, 533 U.S. 678, 690, 691-92 (2001)).[10]

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ent authority to grant bail even where the statute grants no such authority, and secondarily on whether denial of bail violates the Eighth Amendment). There is no suggestion that the particular argument asserted here was considered: that *when a defendant poses no risk of flight or danger to society*, detention without bail violates due process.

[10] Respondent also cites two decisions not mentioned in the certiorari petition—*Kansas v. Hendricks*, 521 U.S. 346 (1997), and *Reno v. Flores*, 507 U.S. 292 (1993)—but neither provides support for the detention at

When detention of a defendant like petitioner does not actually further the government's articulated interest in preventing flight, but instead is based on the absence of some other non-specific "special" circumstance, it fails to meet constitutional standards.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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issue here. *Hendricks* noted that "States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety," and that this Court has "consistently upheld such involuntarily commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards." 521 U.S. at 357. While "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment," the Court upheld Mr. Hendricks' detention because he had been shown to have a mental disorder that caused a lack of volitional control and created an undue risk of future dangerousness. *Id.* at 358, 360. In *Flores*, the decision upholding a regulation permitting detained juvenile aliens to be released only to legal guardians except in unusual circumstances was based on the special status of juveniles (who "are always in some form of custody"), the absence of traditional incidents of incarceration, and the Court's determination that the government's taking custody of a child who is without available guardians best serves the interests and welfare of that child. 507 U.S. at 302, 303.